Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. M. v. Minister of Employment and Social Development*, 2017 SSTADIS 261

Tribunal File Number: AD-16-1276

BETWEEN:

M. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: June 6, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada (Tribunal) dated September 14, 2016. The General Division determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it had found that her disability was not "severe" by the end of her minimum qualifying period on December 31, 2014.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] The Applicant largely seeks a reconsideration of the General Division decision, on the basis that she suffers from severe back pain, depression and anxiety, despite complying with all of her doctors' treatment recommendations. She claims that she would gladly perform any employment, including sitting behind a desk, if she were capable of doing so.

[4] An appeal before the Appeal Division does not provide the opportunity for a reassessment. Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[5] Before leave to appeal can be granted, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA, and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[6] The Applicant submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse and capricious manner or without regard for the material before it, when it stated in paragraph 10 that the Applicant indicated she had completed a Continuing Care Assistant certificate course approximately three or four years earlier. She claims that the General Division erred and that, in fact, she testified that she had trained more than three years ago, in 2003. The Applicant provided a certificate to confirm that she had trained and had completed a course of study as a certified continuing care assistant. The General Division did not have a copy of this certificate, although it noted that the Applicant's questionnaire accompanying her application for a disability pension indicates that she obtained a "CCA certificate" in 2003. I have not reviewed the oral evidence to corroborate the Applicant's submissions that she had testified about her education, but it is clear that the General Division relied on this alleged evidence that she completed the course "three years ago" in coming to its decision.

[7] At paragraph 55, in considering the Applicant's personal characteristics, the General Division found that the Applicant "ha[d] shown she can continue learning by completing a certificate course three years ago, at a time when she reports suffering from both depression and her back pain." From this, it may be that the General Division determined that, although the Applicant was allegedly suffering from a severe disability, she was nevertheless capable of continuing to retrain for a suitable occupation. This finding may have been based on an erroneous finding of fact, if there was no evidentiary foundation for the finding. If the Applicant can establish that she testified or otherwise adduced evidence that she had retrained more than three years ago — indeed, before the onset of her alleged disability — then the General Division may have based its decision on an erroneous finding of fact. (In this regard, the Applicant should consider obtaining a copy of the audio

recording of the teleconference hearing, and then should identify the timestamps where she is alleged to have testified that she had completed the training in 2003.)

[8] I am mindful that there was a 2003 training certificate before the General Division, but clearly the General Division was of the view that the Continuing Care Assistant certificate course that the Applicant had completed "three years ago" (from the time of the General Division hearing) was different from her 2003 training.

[9] The Applicant indicates in her application requesting leave to appeal that she had been confused during the course of the hearing and may have been unclear about dates, to the extent that she may have provided incorrect dates. If this is borne out, i.e. that the Applicant provided incorrect dates to the General Division, the appeal is likely to fail. After all, the Applicant must establish that it is the General Division that erred. If the General Division relied on erroneous evidence that the Applicant had provided, it cannot necessarily be said that the General Division erred.

[10] The Applicant also recounted that she had worked in a guest home for one-and- a-half to two years (from 2003 until 2005), and that she had worked in a special care home for eight to ten months (from 2005 to 2006). The General Division did not base its decision on when the Applicant might have worked in the guest home or special care home, nor did it make any findings based on the fact that she had worked in a guest home and a special care home. I find these statements irrelevant for the purposes of this leave to appeal application.

CONCLUSION

[11] Overall, I am satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is granted. This decision granting leave to appeal does not in any way prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division